U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: [redacted] Date: FEB 17 1999

In re: [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Ann Carr, Esquire
126 East Chestnut Street
Lancaster, Pennsylvania 17602

ON BEHALF OF SERVICE: Theodore J. Murphy
Assistant District Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled

Lodged: Sec. 212(a)(2)(A)(i)(II), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(II)] - Controlled substance violation

APPLICATION: Asylum, withholding of removal; termination of proceedings

In an oral decision rendered on March 6, 1998, an Immigration Judge found that the respondent, a native and citizen of Guinea, was an inadmissible alien under section 212(a)(6)(A)(i) of the Immigration and Nationality Act and therefore subject to removal. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, § 301(c)(1), 110 Stat. 3009-546, 3009-586 ("IIRIRA") (to be codified at 8 U.S.C. § 1182(a)(6)(A)(i)). The Immigration Judge denied the Immigration and Naturalization Service's motion to pretermit the respondent's application for asylum under section 208 of the Act, 8 U.S.C. § 1182. The Immigration Judge then denied the respondent asylum, but granted him withholding of removal to Guinea under section 241(b)(3) of the Act, and terminated proceedings. See IIRIRA § 305(a), 110 Stat. at 3009-586 (to be codified at 8 U.S.C. § 1231(b)(3)). The Service has appealed. The appeal will be dismissed.

I. ASYLUM ELIGIBILITY

A. Background

The respondent admitted the allegations in the Additional Charges of Inadmissibility/Deportability (Form I-261) that in a court of the State of New York, he was twice

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convicted during 1996 of the offense of criminal possession of a controlled substance in the seventh degree in violation of section 220.03 of the New York Penal Law.[1] The offense is a class A misdemeanor subject to a maximum sentence of 1 year. See NY PENAL §§ 70.15, 220.03. The Service moved to pretermit the respondent's application for asylum on the basis that his two convictions for possession of a controlled substance constitute a "drug trafficking crime" as defined in 18 U.S.C. § 924(c), and therefore an aggravated felony within the meaning of section 101(a)(43)(B) of the Act, 8 U.S.C. § 1101(a)(43)(B), and as a result rendering him statutorily ineligible to apply for asylum under section 208(b)(2) of the Act. The Immigration Judge disagreed with the Service's position and denied the motion. See Tr. at 62-68.

The Service contends that based on the Board's holdings in Matter of L-G-, Interim Decision 3254 (BIA 1995), Matter of Davis, 20 I&N 536 (BIA 1992), and Matter of Barrett, 20 I&N Dec. 171 (BIA 1990), the Immigration Judge committed error in finding that the respondent was eligible to apply for asylum. Although the Immigration Judge ultimately denied the respondent's asylum claim as a matter of discretion, we believe it is necessary to address the Immigration Judge's finding which we conclude was in error.

B. Law

An aggravated felony is defined under the Act to include a drug trafficking crime as defined in 18 U.S.C. § 924(c). A drug trafficking crime is defined under that section to include any felony punishable under the Controlled Substances Act (21 U.S.C. § 801 et seq.). Matter of Barrett, supra, at 173. As we explained in Matter of L-G-, supra, slip at 3-4:

> The Controlled Substances Act at 21 U.S.C. § 844(a) (1994) criminalizes simple possession of controlled substances. . . If the defendant has any prior drug convictions, simple possession of any controlled substance is . . . a felony under 21 U.S.C. § 844(a).

We further explained:

> The Board's previous decisions, Matter of Davis, supra, and Matter of Barrett, supra, essentially established a two-pronged test ("Davis/Barrett test") for determining whether a state drug offense qualifies as an aggravated felony under section 101(a)(43) of the Act. . . . Under the second, alternative prong . . . a state drug offense qualifies as a "drug trafficking crime," and thus as an aggravated felony (regardless of state classification as a felony or misdemeanor) if it is analogous to a felony under the federal statutes enumerated in 18 U.S.C. § 924(c)(2) ("federal drug

[1] The respondent admitted in his written response to the Service's motion to pretermit that he was convicted each time of possessing cocaine. Cocaine is classified as a controlled substance under federal and New York law. See 21 U.S.C. § 812(c) (Schedule II); NY PUB HEALTH § 3306 (Schedule II).

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> laws"). Matter of Davis, supra; Matter of Barrett, supra. In other words . . . a state drug offense qualifies as a "drug trafficking crime" if it is punishable as a felony under the federal drug laws.

Matter of L-G-, supra, slip at 5-6 (emphasis in original).

C. Analysis

The Immigration Judge determined that the respondent's two convictions for controlled substance possession in New York do not constitute a drug trafficking crime for three reasons. We address each in turn.

The Immigration Judge first found that the applicable state and federal statutes were not analogous as far as classification and punishment. He noted that the offense is a misdemeanor under New York law even if the defendant has a previous conviction. He observed that each offense is considered in New York a distinct, discrete crime that is not related to the previous possession charge. He added that public policy in New York does not demand a minimum sentence of 15 days in jail or allow sentencing up to 2 years in jail as authorized under the federal statute. He found that a reasonable reading of Matter of Barrett, supra, and Matter of Davis, supra, requires us not to see the two statutes as analogous and that it is stretching the law to call two misdemeanor possession convictions a felony trafficking crime.

However, Congress has decided that a person convicted in federal court of simple possession of a controlled substance will be considered a felon under the Controlled Substances Act, and thereby a drug trafficker, if he or she was previously convicted of a drug offense. There can be no doubt that by incorporation of the term "drug trafficking crime" into the definition of aggravated felony in the Act, Congress has also decided that such persons are subject to removal from the United States. Furthermore, as we explained in Matter of Davis, supra, at 540 n.3, Congress amended the definition of aggravated felony in 1991 to effectively codify our holding in Matter of Barrett, supra, that the definition applied to state convictions. Therefore, it logically follows that two state drug possession convictions can result in an alien being classified as a drug trafficker.

The issue arose in Matter of L-G-, supra, slip at 4, as to the proper definition for determining what is a "felony" for immigration purposes. We had to "decide whether a federal or state definition is applicable when determining whether a state drug offense qualifies as a 'felony' under 18 U.S.C. § 924(c)(2) (1994)." Id. We declined to adopt the more expansive definition of felony in the Controlled Substances Act (21 U.S.C. § 802(13)) advocated by the Service, which encompasses any state felony conviction even if it would constitute only a misdemeanor under federal law, and we instead adopted the narrower definition in 18 U.S.C. § 3559(a), which encompasses only those state convictions which would be a felony under the Controlled Substances Act. Id. slip at 8-10.

We clearly determined in Matter of L-G-, supra, that a federal definition of felony applies. Applying the holding to this case, we agree with the Service that it does not matter that New York, for whatever policy reasons, classifies the respondent's drug possession offense as a misdemeanor or that New York provides a maximum punishment of 1 year confinement for each

violation. We further agree with the Service that our holding in Matter of Barrett, supra, at 174, directs that the focus of the analysis is to determine whether the elements of the state offense are analogous to an offense under the Controlled Substance Act which can result in punishment in excess of 1 year under that Act. Two state convictions for possession of a controlled substance (as defined in the Controlled Substances Act) are clearly analogous to the felony offense under 21 U.S.C. § 844(a). See United States v. Zarate-Martinez, 133 F.3d 1194 (9th Cir. 1998); United States v. Garcia-Olmedo, 112 F.3d 399 (9th Cir. 1997); United States v. Cuevas, 75 F.3d 778 (1st Cir. 1996); United States v. Forbes, 16 F.3d 1294 (1st Cir. 1994); Amaral v. INS, 977 F.2d 33 (1st Cir. 1992); Matter of L-G-, supra.

The Immigration Judge also adopted the respondent's contentions that the New York offense is not analogous to the federal offense because the respondent could not have received a sentence in excess of 1 year under the Controlled Substances Act. The respondent notes that under 21 U.S.C. § 844(a), a conviction for simple possession of any controlled substance may receive a sentence enhancement if the defendant has any prior drug convictions. Respondent's brief at 3 (emphasis in original). However, in order for the federal judge to enhance the sentence, the prosecutor must comply with 21 U.S.C. § 851(a)(1), and file an information before the trial or guilty plea, stating the previous convictions which will be relied upon to enhance the sentence. See United States v. Steen, 55 F.3d 1022 (5th Cir. 1995). (We note that it is the potential enhancement of the sentence up to 2 years that makes the crime a felony under federal law. See Matter of Davis, supra, at 543 n.6). He then notes that we clearly directed in Matter of L-G-, supra, that the Immigration Judges should refer to federal law to promote uniformity and indicated that they should treat the respondent as if in federal court in determining whether the state drug offense is analogous to a federal felony drug offense.

The respondent adds that as a natural extension of this principle, his second state misdemeanor conviction may only be elevated to a federal felony if proper enhancement procedures at the state level were met, thereby making it truly analogous to a federal offense. However, since there are no enhancement procedures in New York for a second possessory offense, the state offense is not analogous to the federal offense. The Immigration Judge observed that the enhancement procedure under 18 U.S.C. § 851(a)(1) is the statutory procedural sine qua non for finding that a second drug possession conviction constitutes a federal drug trafficking crime, and therefore, is more than just a due process requirement. The Immigration Judge concluded that the respondent would not have been labeled a felon or a drug trafficker in federal court if what happened in the State court happened in a federal court.

It is true that the statutory procedural requirements under 21 U.S.C. § 851(a)(1) are to allow the defendant an opportunity to challenge the validity of the prior conviction being used to enhance his or her sentence, and that the sentence cannot be enhanced if the procedure has not been followed. United States v. Steen, supra, at 1025-26. However, we note that a panel of the United States Court of Appeals for the Ninth Circuit considered a similar argument in a case in which the defendant had been convicted of illegal reentry after deportation following conviction of an aggravated felony. See United States v. Garcia-Olmedo, supra. The defendant contended that he could not have been found guilty of the illegal reentry offense under 8 U.S.C. § 1326(b)(2) since the government had not complied with the notice requirements of 21 U.S.C. § 851(a)(1). The court found the contentions inapplicable to the facts of the case because 21 U.S.C. § 851(a)(1) applies only to the enhancement of sentences for Title 21 offenses, and the defendant was convicted of an offense under 8 U.S.C. § 1326(b)(2).

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We find the Ninth Circuit's rationale equally applicable to this case. The respondent has admitted that he was twice convicted in a state court of a drug possession offense. If he had been prosecuted for the second offense in a federal court, the judge may have not had the authority to enhance his sentence if the information was not filed, but neither the Immigration Judge, nor the respondent, have cited any case in which a federal court held that the respondent could not have been convicted of the drug possession offense under 21 U.S.C. § 844(a) which is a felony under the Controlled Substances Act due to the potential length of sentence (emphasis added). We must focus on the elements of the New York drug possession offense of which he was convicted and not on the sentence enhancement provision in the Controlled Substances Act.

We also note that the federal courts in the previously cited cases have affirmed the convictions of the defendants without any indication that 21 U.S.C. § 851(a)(1) was relevant to their appeals. In fact, the Ninth Circuit determined in United States v. Zarate-Martinez, supra, at 1199, that a defendant convicted of illegal reentry after deportation had not been prejudiced by a denial of due process during his earlier deportation proceeding since his two convictions of cocaine possession in Arizona constituted a drug trafficking crime and rendered him ineligible for cancellation of removal as an aggravated felon. There is no indication from the facts of the case that Arizona enhanced the sentence for his second possession conviction since he was initially sentenced for the second conviction to confinement for 100 days while he was sentenced for the first conviction to 365 days. (He was subsequently sentenced to 2 years additional confinement for the second conviction after his probation was revoked.)

The Immigration Judge also determined that his finding was supported by the lack of notice to the respondent of the adverse immigration consequences of his second conviction. The Immigration Judge observed that unless the respondent was informed during his state criminal proceedings that he could be irrevocably deported for his second drug possession conviction, the policy underlying 21 U.S.C. § 851(a)(1) is violated. He added that this is particularly important since the respondent would be ineligible for any form of relief, especially relief from persecution in his country, and barred from returning to the United States for 20 years due to a conviction of an aggravated felony.

The policy concerns underlying 21 U.S.C. § 851(a)(1) are not implicated in this case. Congress has decided that when the government requests that a defendant's sentence be enhanced under the Controlled Substances Act because of a prior drug conviction or convictions, the defendant should be notified of the conviction(s) relied upon by the government since the information can result in additional confinement (1 year in the case of a conviction under 21 U.S.C. § 844(a) with one prior drug conviction). In contrast, as we noted previously, 21 U.S.C. § 844(a) is used only for definitional purposes to determine in a civil proceeding whether an alien is removable from the United States.

We note that federal circuit courts have consistently held that it does not constitute ineffective assistance of counsel for counsel's failure to advise a client that deportation is a possible collateral consequence of a guilty plea to a criminal charge. See Varela v. Kaiser, 976 F.2d 1357, 1358 (10th Cir. 1992) (citing decisions of other circuits). In addition, Congress has the power to declare past criminal conduct a new ground for deportation. Chow v. INS, 113 F.3d 659, 667 (7th Cir. 1997); Scheidemann v. INS, 83 F.3d 1517, 1523 n.8 (3d Cir. 1996); Campos v. INS, 16 F.3d 118, 122 (6th Cir. 1994) (citing cases). In either situation, the aliens were unaware that their criminal conviction could ultimately result in their deportation.

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The respondent, represented by counsel during proceedings, admitted the state drug convictions and was provided the opportunity to challenge his removability. Therefore, we find that the Immigration Judge's due process concerns do not support his finding that the respondent was not convicted of an aggravated felony.

We conclude that the Immigration Judge committed error in determining that the respondent is statutorily eligible to apply for asylum because we find that the respondent was convicted of an aggravated felony as defined in section 101(a)(43)(B) of the Act. Section 208(b)(2) of the Act.

II. WITHHOLDING OF REMOVAL

A. Immigration Judge's Findings

The Immigration Judge further found that the respondent's two simple possession convictions do not constitute a particularly serious crime so as to render him statutorily ineligible to apply for withholding of removal (Tr. at 67-69). Section 241(b)(3)(B)(ii) of the Act as enacted by IIRIRA § 305(a), 110 Stat. at 3009-586 (to be codified at 8 U.S.C. § 1231(b)(3)(B)(ii)). The Service has not appealed this finding, so we will not address it.

The Immigration Judge found the respondent's testimony to be credible based on both his demeanor and his testimony when viewed against the general background information. See Matter of S-M-J-, Interim Decision 3303 (BIA 1997). The Immigration Judge further determined that the respondent had proven that he suffered past persecution on account of his membership in the Peulh tribe in Guinea based on his testimony establishing that the Guinean government deprived him of educational opportunities and arrested, detained, and physically abused him because he is a Peulh who attempted to obtain an educational certificate to further his education abroad. The Immigration Judge then concluded that the presumption that the respondent's life or freedom would be threatened on return to Guinea had not been rebutted since the general background evidence shows continued ethnic tension and discrimination due to domination of the government by another ethnic group and flagrant human rights abuses by the government. 8 C.F.R. § 208.16(b)(2). Therefore, the Immigration Judge ordered the withholding of the respondent's removal to Guinea. 8 C.F.R. § 208.16(c)(1).

B. Service's Contentions

The Service contends that the Immigration Judge erred by finding that the respondent had testified credibly despite the complete lack of corroborating evidence and significant implausible testimony. The Service further contends that the Immigration Judge erred in finding that the respondent sustained his burden of proof when the respondent failed to demonstrate a clear probability of persecution.

The Service asserts that the respondent's claim of educational discrimination is not believable since his testimony shows that he had ample educational opportunities in that he was able to finish secondary school and to enroll in college, albeit to study agriculture instead of veterinary

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medicine as he desired, and he was awarded a scholarship to study natural sciences for several years during the mid-1980's. The Service also contends that if a letter from an Guinean asylee describing widespread educational discrimination against Peulh students is believed, then the respondent's testimony establishes that he has singularly benefited above members of his own ethnic group. The Service adds that his testimony is contradicted by the country conditions report that shows that all major ethnic groups are represented in the government and the military.

The Service also asserts that the respondent claims persecution based upon membership in a particular social group, but he is the only one in the social group since he testified that he was the only one who had the problem with obtaining the educational certificate. The Service contends that he has not presented any evidence that he is a member of group that possesses some immutable or fundamental characteristic. See Matter of Acosta, 19 I&N 211, 233-234 (BIA 1985). The Service further contends that he did not present any evidence that established the nexus between the acts of the government and his membership in a particular social group.

The Service also asserts that the respondent has failed to submit any corroborating evidence. He has not submitted any documents or letters from his family members to establish his identity. He has submitted no evidence from his banker friend who supposedly helped him leave Guinea. He has submitted no evidence of his attendance at the claimed schools. The Service contends that his testimony is too meager to prove his withholding claim.

C. Analysis

The Service urges us to make our own determination of the respondent's credibility. We certainly have the authority to independently assess an Immigration Judge's credibility determination and to make de novo findings. Balasubramanrim v. INS, 143 F.3d 1757, 1761 (3d Cir. 1998); Matter of A-S-, Interim Decision 3336, slip op. at 4 (BIA 1998). However, "because the Immigration Judge has the advantage of observing the alien as the alien testifies, the Board accords deference to the Immigration Judge's finding concerning credibility and credibility-related issues." Matter of A-S-, supra, slip op. at 5. A high degree of deference extends to an Immigration Judge's demeanor finding because "the Immigration Judge is in the unique position of witnessing the live testimony of the alien at the hearing." Id. slip op. at 7.

We also note that "[a]dverse credibility findings are appropriately based on inconsistent statements, contradictory evidence, and inherently improbable testimony." Matter of S-M-J-, Interim Decision 3303, slip op. at 9 (BIA 1997). The Service does not contend that the respondent's testimony was internally inconsistent, but asserts that his testimony regarding educational discrimination was implausible in light of his educational achievements or contradicted by the general background information showing participation of his ethnic group in the government and the military.

However, the respondent correctly notes in his appellate brief that he testified that had been forced to study agriculture rather than his desired field, studies terminated by the military takeover, and that he studied natural sciences under another name that would not identify him as a Peulh in order to receive government support. Further, he was not able to take advantage of a scholarship offered by the Romanian rather than the Guinean government after the Guinean government discovered his true identity. Respondent's brief at 6-7. The fact that he was able to receive some education does not render his testimony implausible. We agree with the

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Immigration Judge and the respondent that the general background information is sufficient to show hostility by the Soussou ethnic majority, which dominates the government, against Peulhs despite their ostensible representation in the government and the military. See Exh 5b, 6B, 6E. Furthermore, as noted by the respondent (brief at 8), corroboration is not require to establish credibility. Senathirajah v. INS, 157 F.3d 210, 216 (3d Cir. 1998). The Service has not alleged an error that establishes the Immigration Judge's credibility finding is not supported by the record. Accordingly, we defer to his finding. Matter of A-S-, supra.

We do not find the Service's contentions concerning membership in a particular social group to be persuasive. It is apparent from his oral decision that he determined that the respondent had suffered persecution on account of being a member of the Peulh tribe and not solely on the basis of being a student as implied by the Service's contentions. See Senathirajah v. INS, supra (alien persecuted on account of being an ethnic Tamil in Sri Lanka).

The Service contends that the respondent's meager testimony without any corroborating evidence is not sufficient to have sustained his burden of proof. The respondent's testimony, if credible, persuasive, and specific, may suffice without documentary evidence. Balasubramanrim v. INS, supra, at 165. Otherwise, a combination of detailed testimony and corroborative background evidence is necessary to prove a case of persecution. Matter of Y-B-, Interim Decision 3337 (BIA 1998).

The Immigration Judge found the respondent's testimony to be detailed. The Service has not made any specific allegations as to where the respondent's testimony lacked detail concerning the essential elements of his claim, and we cannot find that the Immigration Judge's is unsupported by the record. In light of our deference to the Immigration Judge's credibility finding, the respondent's detailed testimony, and the regulatory presumption when past persecution has been demonstrated, we affirm the Immigration Judge's decision. See Matter of O-Z- & I-Z-, Interim Decision 3346 (BIA 1998) (cumulative effects of harm rose to the level of persecution). Accordingly, we enter the following order.

ORDER: The appeal is dismissed.

FOR THE BOARD